

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH A. IOPPOLO, *et al.*,

Plaintiffs,

v.

PORT OF SEATTLE, *et al.*,

Defendants.

CASE NO. C15-0358-JCC

ORDER GRANTING MOTIONS TO
DISMISS

These matters come before the Court on Defendants King County's, the Port of Seattle's, and Sound Transit's Joint Motion to Dismiss Tort Claims (Dkt. No. 23) and Defendant Puget Sound Energy's Motion to Dismiss (Dkt. No. 29). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS both Defendants King County's, the Port of Seattle's, and Sound Transit's Joint Motion to Dismiss Tort Claims (Dkt. No. 23) and Defendant Puget Sound Energy's Motion to Dismiss (Dkt. No. 29).

I. BACKGROUND

This case is a putative class action seeking money damages for Defendants' allegedly tortious usurpation of Plaintiffs' property. The facts underlying this case have been thoroughly detailed in orders pertaining to a related case before this Court, namely, *Kaseburg, et al. v. Port of Seattle, et al.*, C14-0784-JCC, in which many of the instant Plaintiffs seek to quiet title and to

1 obtain declaratory relief with regard to the same property and against most of the same
2 Defendants. (*See e.g.*, Order Denying Plaintiffs’ Motion for Declaratory Judgment, Dkt. No.
3 91.) These cases arise out of the railbanking of a former BNSF Railway corridor on the eastern
4 shores of Lake Washington. (Complaint, Dkt. No. 1 at 8.) The Port and King County received
5 an interest in the corridor via operation of the Trails Act. (*Id.* at ¶38.) Plaintiffs maintain that it
6 is an interest solely in a surface easement for a hiking and biking trail “with the possible
7 reactivation of a railroad.” (*Id.*) In both the instant case and in *Kaseburg*, Plaintiffs claim that
8 Defendants have unlawfully expanded the scope of this interest. (*Id.*)

9 Specifically, Plaintiffs allege that

10 The Port, through Quit Claim Deed from BNSF, and pursuant to the Trails
11 Act, acquired BNSF’s easement over the surface of the [railroad corridor],
12 which pursuant to the Trails Act, is now an easement for a hiking and
13 biking trail with the possible reactivation of a railroad. The Port, then,
14 pursuant to agreements with King County, assigned some of the surface
15 rights in the railroad corridor to King County and then improperly and
16 illegally attempted to usurp the landowners’ fee interests in the aerial
rights and improperly and illegally retained all rights to negotiate
agreements with other utilities for the use of the right-of-way, including
subsurface and aerial rights, which the Port had no rights to, and claimed
all revenues derived from any such agreements.

17 (*Id.*)

18 Further, Plaintiffs object to what they allege was the unlawful transfer of the Port’s
19 interest to a handful of utility companies. For instance, “the Port granted nonexclusive perpetual
20 easements to PSE over, under, along, across and through the former railroad right-of-way. The
21 purported easement includes aerial and subsurface rights and PSE intends to utilize the Plaintiffs’
22 subsurface rights and aerial rights in the right-of-way pursuant to PSE’s ‘Easement Agreements’
23 to place and maintain overhead and underground facilities and equipment.” (*Id.* at ¶ 39.)
24 According to Plaintiffs, “PSE’s easement from the Port, to the extent it purportedly grants any
25 rights beyond the surface of Plaintiffs’ land for a recreational trail, is invalid and unenforceable.”
26 (*Id.* at ¶44.) Additionally, “the Port also granted a purported perpetual High Capacity

1 Transportation Easement to Sound Transit on April 11, 2012 . . . [which] includes ‘the right to
 2 own or operate a High Capacity Transit System . . . in, on, under, over, along, across, and
 3 through the Property.’” (*Id.* at ¶40.) According to Plaintiffs, “Sound Transit’s easement from
 4 the Port is also invalid and unenforceable.” (*Id.* at ¶44.)

5 Plaintiffs, on behalf of all landowners who owned land adjacent to the Eastside rail
 6 corridor, bring this putative class action against several state and municipal entities (hereinafter
 7 “Governmental Defendants,” namely the Port of Seattle, King County, Central Puget Sound
 8 Regional Transit Authority (Sound Transit), and Cascade Water Alliance, and also against a for-
 9 profit, private corporation, Puget Sound Energy, Inc. (*Id.* at 5.) Plaintiffs bring several tort-
 10 based claims: Conspiracy to Illegally Utilize the Trails Act to Defraud Plaintiffs of their Property
 11 Rights (against all Defendants); Trespass (against King County, Puget Sound Energy, Sound
 12 Transit, and Cascade); Inverse Condemnation (against King County, Puget Sound Energy, Sound
 13 Transit, and Cascade); Slander of Title (against all Defendants); and Unjust Enrichment (against
 14 the Port). (*Id.* at 16-23.)

15 Before the Court today is three of the four Governmental Defendants’ Motion to Dismiss
 16 for failure to comply with state notice of tort claims requirements (Dkt. No. 23) and Puget Sound
 17 Energy’s Motion to Dismiss (Dkt. No. 29).

18 **II. King County’s, Port’s, and Sound Transit’s Joint Motion to Dismiss**

19 **A. Legal Standard**

20 Washington’s tort claims statute provides that any plaintiff seeking “damages against . . .
 21 local government entities” must present the claim to an agent appointed by the government
 22 defendant *prior* to filing suit. RCW 4.96.020(2).¹ Under RCW 4.96.020, plaintiffs are barred
 23

24
 25 ¹ “The governing body of each local governmental entity shall appoint an agent to receive any
 26 claim for damages made under this chapter. The identity of the agent and the address where he or
 she may be reached during the normal business hours of the local governmental entity are public

1 from filing a suit in court against a local government entity until at least sixty days after the
 2 claim has been presented to the designated agent of that entity. RCW 4.96.020(3)(f)(4).² This
 3 statute is to be liberally construed and substantial compliance is permitted. *See* RCW
 4 4.96.020(5) (“With respect to the content of claims under this section and **all** procedural
 5 requirements in this section, this section must be liberally construed so that substantial
 6 compliance will be deemed satisfactory.”) (emphasis added).³

7 However, “[n]oncompliance with the statute is not substantial compliance.” *Corona v.*
 8 *Boeing Co.*, 111 Wash. App. 1, 8 (2002). Washington’s notice of tort claims statute “forbids the
 9 commencement of a tort action ‘until sixty days have elapsed after’ the filing of the notice of
 10 claim with the ‘local government entity.’” *Troxell v. Ranier Public School District No. 307*, 154

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 13 records and shall be recorded with the auditor of the county in which the entity is located. **All**
 14 **claims for damages against a local governmental entity, or against any local governmental**
 15 **entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the**
 16 **agent within the applicable period of limitations within which an action must be**
 17 **commenced.** A claim is deemed presented when the claim form is delivered in person or is
 18 received by the agent by regular mail, registered mail, or certified mail, with return receipt
 19 requested, to the agent or other person designated to accept delivery at the agent's office. The
 20 failure of a local governmental entity to comply with the requirements of this section precludes
 21 that local governmental entity from raising a defense under this chapter.” Wash. Rev. Code Ann.
 22 § 4.96.020 (West).

23 ² “No action subject to the claim filing requirements of this section shall be commenced against
 24 any local governmental entity, or against any local governmental entity's officers, employees, or
 25 volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty
 26 calendar days have elapsed after the claim has first been presented to the agent of the governing
 body thereof.” Wash. Rev. Code Ann. § 4.96.020 (West).

³ Substantial compliance extends to the presentment requirements following the 2009 legislative
 amendments. *Bell v. City of Tukwila*, No. C10-0379-TSZ, 2011 WL 1045586, at *1 (W.D.
 Wash., Mar. 21, 2011) (Judge Thomas S. Zilly presiding) (“The relevant statute now provides
 that ‘[w]ith respect to the content of claims under this section *and all procedural requirements in*
this section, this section must be liberally construed so that substantial compliance will be
 deemed satisfactory.’ Thus, although the case law prior to 2009 differentiated between
 content and procedure (presentment), requiring strict compliance as to the latter, the current
 statute makes no such distinction and prescribes a substantial compliance standard for both
 content and procedure.”).

1 Wash. 2d 345, 350-51 (2005) (emphasis added). Substantial compliance with RCW 4.96.020 is
 2 a “condition precedent to the commencement of any action claiming damages.” RCW
 3 4.96.010(1).

4 **B. Discussion**

5 King County, the Port, and Sound Transit (the moving Governmental Defendants) are
 6 “local government entities” within the meaning of this statute. *See* RCW 4.96.010(2) (including
 7 municipal corporations and counties in the definition of local government entity); RCW
 8 39.50.010(3) (indicating that port districts and regional transit authorities are municipal
 9 corporations).
 10

11 Plaintiffs’ claims against King County, the Port, and Sound Transit seek “damages
 12 arising out of their tortious conduct.” Conspiracy to defraud, trespass, slander of title, and unjust
 13 enrichment⁴ all sound in tort and are therefore subject to RCW 4.96.020.⁵

14 However, Plaintiffs failed to give notice of their claims to King County, the Port, or
 15 Sound Transit before bringing this action. Declarations from the County’s, Port’s, and Sound
 16

18 ⁴ Plaintiffs’ unjust enrichment claim is essentially a conversion claim – that the Port never
 19 acquired fee ownership of Plaintiffs’ property, and so acted unlawfully in granting easement
 20 rights to the utility companies. (*See* Complaint, Dkt. No. 1 at ¶94.)

21 ⁵ *See Kietz v. Gold Point Mines*, 5 Wash. 2d 224, 233 (1940) (“Where a conspiracy results in the
 22 commission of a wrong, the cause of action sounds in tort and not in contract, though the acts
 23 constituting the wrong may affect contractual relationships.”); *Bradley v. American Smelting and*
 24 *Refining Co.*, 104 Wash. 2d 677, 681 (1985) (recognizing trespass as an intentional tort); *Rorvig*
 25 *v. Douglas*, 123 Wash. 2d 854, 862-63 (1994) (recognizing slander of title as a general tort);
 26 *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 832 (S.D.N.Y., 1986) (holding that
 because the underlying “factual basis for the government’s [unjust enrichment] claims is that
 defendant knowingly and purposefully presented false documents to obtain money,” (a tort), the
 overlying unjust enrichment claim sounds in tort also); *Westwood Pharmaceuticals, Inc. v.*
National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1285 (W.D.N.Y., 1990) (holding that
 because “the gravamen of that [unjust enrichment] claim centers on National Fuel’s alleged
 ‘intentional and/or negligent acts [torts],’ . . . [the unjust enrichment claim] thus sounds in tort”).

1 Transit's respective agents contain averments that no claims were presented prior to the
2 commencement of the suit. (Declaration of Anne Norris, Dkt. No. 25 at ¶8 (King County);
3 Declaration of Jeff Hollingsworth, Dkt. No. 24 at ¶6 (Port); Declaration of Sarah Kern, Dkt. No.
4 27 at ¶5 (Port); Declaration of Vianney Muse, Dkt. No. 26 at ¶5 (Port); Declaration of Kathryn
5 Flores, Dkt. No. 28 at ¶7 (Sound Transit).)

6 Plaintiffs do not deny that they failed to follow any of RCW 4.96.020's requirements, and
7 explicitly admit to failing to "file formal claims with any of the municipal entities prior to filing
8 this lawsuit." (Plaintiffs' Response, Dkt. No. 33 at 2.)
9

10 In defense of this failure, Plaintiffs argue that compliance with RCW 4.96.020 would be
11 useless because this is a class action, because Defendants failed to comply with sundry technical
12 aspects of RCW 4.96.020, because Defendants have not shown that they acted within the scope
13 of their authority in allegedly committing the torts, and because unjust enrichment is not a tort.
14 These arguments are unavailing.

15 First, RCW 4.96.020 applies to "all claims" and provides no exceptions to compliance
16 when the contemplated action is a class action, when the plaintiffs feel that their claims are
17 especially complex, or when plaintiffs opine that application of the law would be "a useless
18 exercise." RCW 4.96.020(3). (*See* Plaintiffs' Amended Response, Dkt. No. 34 at 2-3.)
19

20 Second, unlike Plaintiffs, Defendants, at minimum, *substantially* complied⁶ with RCW
21 4.96.020's requirements by filing, with the county auditor, the identity⁷ of the agent and address
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25 ⁶ Again, the current version of RCW 4.96.020 states that with respect to "*all* procedural
26 requirements in this section, this section must be liberally construed so that substantial
compliance will be deemed satisfactory." RCW 4.96.020(5) (emphasis added). Section 5 does
not make substantial compliance available to claimants only/deny this to the government.

1 at which he may be reached⁸ – the only requirements that can be reasonably derived from RCW
2 4.96.020(2). *See* RCW 4.96.020(2).

3 Third, the “acting in such capacity” limitation applies to “officers, employees, or
4 volunteers,” not to the local government entity itself. RCW 4.96.020(1) & (4).

5 Fourth, while an unjust enrichment claim may also be brought in a contract or quasi-
6 contract action, this *remedy* is not exclusive to that field. As the Seventh Circuit has explained,
7 “[u]njust enrichment is a common-law theory of *recovery* or restitution that arises when the
8 defendant is retaining a benefit to the plaintiff’s detriment, and this retention is unjust. What
9 makes the retention of the benefit unjust is often due to some improper conduct by the defendant.
10 And usually this improper conduct will form the basis of another claim against the defendant in
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13 ⁷ RCW 4.96.020(2) carries no requirement that this agent identification be *by name* – the
14 required information is merely the “identity” of the agent, which could be construed as to allow
15 for identification by title/ job position alone. Section 3(c) of the statute does mention the “name”
16 of the agent, but this is *not* in reference to what the local government entity must file with the
17 auditor, (the basis of Plaintiffs’ objection) but rather in reference to instructions that must
18 accompany the standard tort claim form. Further, if the requirement regarding identity is still
19 ambiguous, that requirement must be construed in favor of the Governmental Defendants given
20 Section 5’s caveat that “with respect to . . . *all* procedural requirements in this section, this
21 section must be liberally construed so that substantial compliance will be deemed satisfactory.”
22 Thus, the Court is persuaded that all moving Governmental Defendants (including Sound
23 Transit) have *substantially* complied with RCW 4.96.020. Further, the case emphasized by
24 Plaintiffs, *Estate of Connelly*, 145 Wash. App. 941 (2008), *preceded* the 2009 amendment
25 permitting substantial compliance (Section 5), and also does not unambiguously state that
26 “identity” implies the *personal name* of the agent – indeed the *Connelly* court’s analysis suggests
that specifying the agent’s *position* is sufficient. *See id.* at 947. In *Estate of Connelly*, the
government agency had failed to even *appoint* an agent (and thus, had failed to specify even the
title of the person appointed as agent).

⁸ RCW 4.96.020(2) provides that the government agency must *file with the auditor* “[t]he
identity of the agent and the address where he or she may be reached *during* the normal business
hours” of the agency. RCW 4.96.020(2) (emphasis added). Section (3)(c) requires the
government agency to specify the normal business hours of the government agency *on the tort
claim form*. The Port’s notice of claim form specifies the business hours of the Port (*see*
Declaration of Kristin Ballinger, Dkt. No. 38, Ex. A); recording the business hours with the
auditor is not mandated by RCW 4.96.020.

1 tort, contract, or statute.” *Cleary v. Philip Morris, Inc.*, 656 F.3d 511, 517 (7th Cir. 2011).⁹

2 Here, the alleged improper conduct was tortious – conversion. *See* notes 4 & 5, *surpa*.

3 Plaintiffs’ failure to substantially comply with the requirements of RCW 4.96.020
4 justifies dismissal of the tort claims against the moving Governmental Defendants. There is
5 substantial precedent for doing so in both this state and in this federal district. *See Holland v.*
6 *King County Adult Detention*, 2013 WL 5652505 at *7 (W.D. Wash., Oct. 15, 2013) (Judge
7 James L. Robart presiding) (holding that “as to any asserted state law tort claims against King
8 County Defendants, Mr. Holland’s failure to file a notice of claim with King County’s designated
9 agent pursuant to RCW 4.92.020 requires the court to dismiss those claims. Accordingly, the
10 court grants King County Defendants’ motion for summary judgment with respect to Mr.
11 Holland’s state law tort claims”). *See also White v. Shaffer*, 2014 WL 1116735 at *2 (W.D.
12 Wash., Mar. 20, 2014) (“Washington’s claim-filing statute, RCW 4.96.020, requires at the very
13 least substantial compliance with its pre-claim notice procedures. Plaintiff does not claim that he
14 followed these procedures, or that he was somehow prevented from doing so. He did not, and
15 his negligence claim against Pierce County is facially deficient. That claim is DISMISSED.”);
16 *Cronk v. City of West Richland*, 2015 WL 853863 at *4 (E.D. Wash., Feb. 26, 2015) (“The Court
17 finds that Plaintiff was required by RCW 4.96.020 to provide a notice of tort claim to the City
18 Clerk Plaintiff undisputedly did not provide the required notice, and Defendants are not
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24 ⁹ *See also* the Third Restatement of Restitution and Unjust Enrichment, § 5, Topic 1 (“Because
25 restitution is concerned only with profitable wrongs, the violations that may serve as the basis of
26 a claim to recover unjust enrichment consists for the most part of wrongful interference with
rights to property (broadly defined). Property rights are infringed by certain wrongs classified as
torts, and by wrongs that are equitable in nature, involving breach of duty imposed by a fiduciary
or confidential relation.”).

1 estopped from asserting, nor have they waived, RCW 4.96.020's notice requirement as a defense.
 2 Accordingly, . . . Defendants' Motion for Partial Summary Judgment . . . is GRANTED.”).

3 Thus, Plaintiffs’ civil conspiracy, trespass, slander of title, and unjust enrichment claims
 4 against King County, the Port of Seattle, and Sound Transit are hereby DISMISSED and these
 5 Defendants’ Joint Motion to Dismiss (Dkt. No. 23) is hereby GRANTED.

7 **III. Puget Sound Energy’s Motion to Dismiss**

8 **A. Legal Standard**

9 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move for dismissal
 10 when the opposing party “fail[s] to state a claim upon which relief can be granted.” To grant a
 11 motion to dismiss, the court must conclude that the moving party is entitled to judgment as a
 12 matter of law, even after accepting all factual allegations in the complaint as true and construing
 13 them in the light most favorable to the nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925
 14 (9th Cir. 2009).¹⁰ There must be no genuine issues of material fact in dispute. *Id.*

15 However, to survive a motion to dismiss, a plaintiff must cite facts that, if accepted as
 16 true, support a “plausible” cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-
 17 56 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows
 18 the court to draw the reasonable inference that the defendant is liable for the misconduct
 19 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a
 20 cause of action, supported by mere conclusory statements, do not suffice.” *Id.* In short, the
 21 factual allegations in a complaint must “raise a right to relief above the speculative level.”
 22 *Twombly*, 550 U.S. at 555 (2007).

23 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
 24 _____

25 ¹⁰ “[T]he same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c)
 26 analog.” *Dworkin v. Hustler Magazine, Inc.*, 867 F. 2d 1188, 1192 (9th Cir. 1989).

specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. In reviewing motions to dismiss, courts may consider documents referenced by the complaint without converting the motion into one for summary judgment. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

B. Discussion

Defendant Puget Sound Energy, Inc. (PSE) has brought its own¹¹ Motion to Dismiss on Federal Rule of Civil Procedure 12(b)(6) grounds. (Dkt. No. 29.) In this Motion, PSE argues for the dismissal of Plaintiffs’ claims of conspiracy, trespass, inverse condemnation, and slander of title. (*Id.* at 2.)

1. Conspiracy Claim

In Count II of the Complaint, Plaintiffs allege that all Defendants, including PSE, conspired to “secure property rights in the abandoned railroad corridor in support of . . . utility uses, ostensibly utilizing and relying on the Trails Act to announce and profess ‘acquired’ property rights in the railroad corridor that the Trails Act and state law did not allow.” (Complaint, Dkt. No. 1 at ¶59.)

To demonstrate a claim for civil conspiracy under Washington law, the claimant must demonstrate with “clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy.” *Wilson v. State*, 84 Wash. App. 332, 350-51 (1996). “A properly pled conspiracy

¹¹ As a private entity, PSE did not join in the Governmental Defendants’ Motion to Dismiss on RCW 4.96.020 grounds.

1 ‘must set forth with particularity the facts and circumstances constituting the alleged
2 conspiracy.’” *Swartz v. KPMG, LLC*, 401 F. Supp. 2d 1146, 1157 (W.D. Wash., 2004).

3 Civil conspiracy is not, by itself, an actionable claim. “The mere agreement to do a
4 wrongful act can never alone amount to a tort.” *W.G. Platts, Inc. v. Platts*, 73 Wash. 2d 434, 439
5 (1968). Thus, a claim for civil conspiracy necessitates the successful pleading of an underlying
6 actionable tort or other illegal act. *See id.* *See also Northwest Laborers-Employers Health and*
7 *Security Trust Fund v. Phillip Morris, Inc.*, 58 F. Supp. 2d 1211, 1216 (W.D. Wash., 1999).

9 Plaintiffs claim that PSE conspired with the other Defendants to use the Trails Act to
10 “defraud” the Plaintiffs of their property interests. (Complaint, Dkt. No. 1 at ¶6; p. 16; ¶62.) As
11 fraud is the underlying illegal act alleged by Plaintiffs, Plaintiffs must successfully plead a claim
12 for fraud if they are to successfully plead a claim for civil conspiracy. *See W.G. Platts*, 73 Wash.
13 2d at 439. “Rule 9(b) imposes heightened pleading requirements where ‘the object of the
14 conspiracy is fraud[.]’” *Swartz*, 476 F.3d at 765. Plaintiffs do not meet these heightened
15 requirements.

17 For instance, “[t]o maintain a claim for fraud under Washington law, Plaintiff must show
18 that he ‘justifiably relied on the defendant’s misrepresentations.’” *Schweikert v. Hunts Point*
19 *Ventures, Inc.*, 2014 WL 6886630 at *7 (W.D. Wash., Dec. 4, 2014). However, Plaintiffs have
20 not alleged that they justifiably relied on any misrepresentation made by Defendants. In fact,
21 Plaintiffs proclaim the opposite – they state repeatedly that “over 100 years of case law from the
22 Washington Supreme Court” leaves no doubt that the easements BNSF held were “for railroad
23 purposes only.” (Complaint, Dkt. No. 1 at ¶22.) In their Response, Plaintiffs do not attempt to
24 refute the fact that they have not successfully pled fraud. (Response, Dkt. No. 35 at 5.)
25
26

1 Instead, Plaintiffs attempt to argue that the other torts they plead, such as trespass, inverse
 2 condemnation, unjust enrichment, and slander of title, should be construed as additional objects
 3 of and to have been accomplished through the alleged civil conspiracy. (*Id.*) This argument is
 4 unavailing. Plaintiffs entitle their civil conspiracy claim “Conspiracy to . . . Defraud” and that
 5 section makes no mention of trespass, inverse condemnation, slander of title, or unjust
 6 enrichment. Further, as the ensuing sections will show, neither were Plaintiffs’ claims for
 7 trespass, inverse condemnation, and slander of title successfully pled against PSE.¹²

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 9 Accordingly, the Court GRANTS PSE’s Motion to Dismiss with regard to Plaintiffs’
 10 claim for civil conspiracy.

11 2. *Trespass Claim*

12 In Count III, Plaintiffs allege that Defendants, including PSE, have unlawfully “placed
 13 water and sewer pipes, underground cable[s], underground power lines, overhead power lines,
 14 and/or other infrastructure beneath the subsurface or above the surface of Plaintiffs’ property in
 15 the railroad corridor by affirmative acts” despite having “no ownership interest in the railroad
 16 corridor whatsoever” nor any “subsurface and aerial rights in the railroad corridor,” due to the
 17 fact that “the easements purportedly granted by the Port to PSE and Sound Transit are invalid
 18 and unenforceable because the Port owned no property interest to convey.” (Complaint, Dkt.
 19 No. 1 at ¶¶70-71.)

20
 21 Under Washington law, the elements for intentional trespass are: “(1) an invasion
 22 affecting an interest in the exclusive possession of property; (2) an intentional doing of the act
 23 which results in the invasion; (3) reasonable foreseeability that the act done could result in an
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25
 26 ¹² Plaintiffs do not bring unjust enrichment claims against PSE.

1 invasion of plaintiff's possessory interest; and (4) substantial damage to the res." *Seal v.*
 2 *Naches-Selah Irrigation District*, 51 Wash. App. 1, 5 (1988).

3 Plaintiffs' trespass claim is "threadbare" and insufficient to survive a motion to dismiss.
 4 The statement that "[u]pon information and belief, the Defendants have placed water and sewer
 5 pipes, underground cable[s], underground power lines, overhead power lines, and/or other
 6 infrastructure beneath the subsurface or above the surface of Plaintiffs' property" (Complaint,
 7 Dkt. No. 1 at ¶71) is a "naked assertion devoid of further factual enhancement." *See Iqbal*, 556
 8 U.S. at 678.¹³ Such assertions do not raise Plaintiffs' claims above the speculative level, and
 9 cannot survive a motion to dismiss. *See Blantz v. California Department of Corrections*, 727
 10 F.3d 917, 927 (9th Cir. 2013).

12 Not only is this bare assertion devoid of the factual details that would make it plausible, it
 13 is also contradicted by several statements repeated by Plaintiffs throughout their Complaint. In
 14 characterizing the current situation, Plaintiffs state that PSE "intends to utilize the Plaintiffs'
 15 subsurface rights and aerial rights in the right-of-way pursuant to PSE's 'Easement Agreements'
 16 to place and maintain overhead and underground facilities and equipment," *connoting future, not*
 17 *present action*. (See *e.g.*, Complaint, Dkt. No. 1 at ¶39.) Allegations in a complaint are
 18 admissions binding on the maker. *American Title Insurance Co. v. Lacelaw Corp.*, 861 F.2d
 19 224, 226 (9th Cir. 1988).

23 ¹³ Further, even if Plaintiffs had offered "further factual enhancement" for their claim that
 24 *Defendants* had placed cables and pipes under their property, this would not raise their claims
 25 against *PSE* above the speculative level, given that there are five Defendants, any one of whom
 26 could have installed this purported infrastructure. *See Jackson v. Nelson*, 405 F.2d 872, 873-74
 (9th Cir. 1968) (affirming Rule 12(b)(6) dismissal where the court found that the individual
 defendants were not sufficiently referenced in the pleadings such that the court could not
 determine which defendant had committed which act).

1 Accordingly, the Court GRANTS PSE's Motion to Dismiss as to Plaintiffs' claim for
2 trespass.

3 3. *Inverse Condemnation Claim*

4 In Count IV, Plaintiffs allege that the "Defendants *all* have the power of eminent domain
5 granted by the Washington legislature" but that Defendants, including PSE, "utilized Plaintiffs'
6 subsurface and aerial rights without paying Plaintiffs and without exercising their condemnation
7 rights." (Complaint, Dkt. No. 1 at ¶¶77, 79 (emphasis added).) Plaintiffs claim that this entitles
8 them to "damages for the inverse condemnation of their land, [and] compensation for the value
9 of subsurface and aerial rights that have already been taken and sold." (*Id.* at 82.)

11 "The term 'inverse condemnation' is used to describe an action alleging a governmental
12 'taking' or 'damaging' that is brought to recover the value of property which has been
13 *appropriated in fact, but with no formal exercise of the power of eminent domain.*" *Dickgieser v.*
14 *State*, 153 Wash. 2d 530, 534-35 (2005). "A takings does not exist unless an invasion causes
15 damage properly characterized as permanent, or recurring, or chronic and unreasonable." *Citoli*
16 *v. City of Seattle*, 115 Wash. App. 459, 488 (2002).

18 Defendants argue that Plaintiffs' inverse condemnation claim makes no sense, as the
19 same Plaintiffs obtained a judgment of more than \$141 million "based on the federal
20 government's taking of their reversionary interests when the corridor was railbanked," in the
21 Federal Claims case related to the instant matter, *Haggart v. United States*, 116 Fed. Cl. 131
22 (2014). (Motion to Dismiss, Dkt. No. 29 at 8-9.) PSE argues that if the federal government
23 indeed appropriated the property, as Judge Lettow found, and was thus forced to pay just
24 compensation, then the state and municipal governmental entities could convey valid utility
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1 easements to PSE, and PSE could have no liability for inverse condemnation as a result of using
2 (or intending to use) these easements. (*Id.*)

3 The Court is compelled by this reasoning. Even if all the facts alleged by Plaintiffs were
4 true, the previous use of eminent domain and a paying of just compensation preclude later
5 actions for inverse condemnation of the very same property.

6 Further, PSE submits that an inverse condemnation plaintiff must prove a “taking” that is
7 greater than “a mere tortious interference.” (Motion, Dkt. No. 29 at 8 (quoting *Gaines v. Pierce*
8 *County*, 66 Wash. App. 715, 725 (1992)).) Meanwhile, Plaintiffs have stated that PSE merely
9 “*intends* to utilize the Plaintiffs’ subsurface rights and aerial rights in the right-of-way pursuant
10 to PSE’s ‘Easement Agreements’ to place and maintain overhead and underground facilities and
11 equipment,” *in the future*. (Complaint, Dkt. No. 1 at ¶39.) Even if the facts Plaintiffs allege
12 were true, there could be no taking at the point that PSE merely (allegedly) *intends* to use
13 Plaintiffs’ property.
14

15 Accordingly, the Court GRANTS PSE’s Motion to Dismiss as to Plaintiffs’ claim for
16 inverse condemnation.
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18 4. *Slander of Title Claim*

19 In Count V, Plaintiffs bring a slander of title claim against all Defendants, including PSE.
20 Plaintiffs allege that PSE and the other Defendants “have acted as if, through both written and
21 verbal statements, [] they own the underlying fee in the railroad corridor, including subsurface
22 and aerial rights,” which has “slandered Plaintiffs’ actual fee ownership in the right of way and
23 [has] thereby diminished the value of Plaintiffs’ fee ownership in their property . . . and reduced
24 the value of the property for resale.” (Complaint, Dkt. No. 1 at ¶¶ 85, 87, 89.)
25
26

1 “The necessary elements of a slander of title action are that the words: (1) must be false;
2 (2) must be maliciously published; (3) must be spoken with reference to some pending sale or
3 purchase of the property; (4) must result in a pecuniary loss or injury to the plaintiff; and (5)
4 must be such as to *defeat the plaintiff’s title*.” *Pay n’ Save Corp. v. Eads*, 53 Wash. App. 443,
5 448 (1989).

6 PSE seeks dismissal because Plaintiffs “allege no facts that would show that PSE ever
7 claimed *fee ownership* to the detriment of the Plaintiffs. Indeed the remainder of the complaint
8 alleges that PSE merely claims utility *easement* rights over the plaintiffs’ properties.” (Motion,
9 Dkt. No. 29 at 9 (emphasis added).) The Court agrees. This claim, given the facts incorporated
10 by reference, is not properly pled against PSE. The specific facts alleged by Plaintiffs are
11 supportive of a claim against King County, but not PSE. (*See e.g.*, Complaint, Dkt. No. 1 at
12 ¶88.)

14 PSE also seeks dismissal of this claim on the basis that Plaintiffs have not alleged facts
15 sufficient to suggest that it has interfered with any pending sale of the Plaintiffs’ property,
16 causing pecuniary loss or injury. The Court finds this to offer additional grounds supporting
17 dismissal of this claim. Plaintiffs merely plead that their property values have declined because
18 their property rights in the corridor have been usurped by PSE. (Complaint, Dkt. No. 1 at ¶89.)
19 Plaintiffs do not allege that PSE made statements “with reference to some pending sale or
20 purchase of the property” that resulted in some “pecuniary loss or injury” to them. Plaintiffs do
21 not plead that there is any pending sale of their land in which they expect to receive less than
22 they would have before PSE allegedly claimed title to their land. A single, general, vague
23 reference to “resale” (*see id.*) is insufficient to allege a connection to a pending sale or purchase
24 of the property by Plaintiffs.
25
26

Plaintiffs' statement that the "slander of title action stems from the sale of property interests owned by Plaintiffs *by the Defendants*" (Response, Dkt. No. 35 at 8 (emphasis added)), is unavailing. "Slander of title is *only* available where the defendant has interfered with the *plaintiff's* sale of the property. . . . Where no sale is pending, contemplated, or has even been attempted, [a] speculative assertion [that defendant has cast plaintiff's title into doubt] is insufficient to support a slander of title claim." *Lapinski v. Bank of America*, 2014 WL 347274 at *5 (W.D. Wash., Jan. 30, 2014) (emphasis added) (granting motion to dismiss slander of title claim *without leave to amend*). *See also Pay N' Sav*, 53 Wash. App. at 448 (affirming trial court's dismissal of slander of title claim where plaintiff conceded that no sale or purchase of the property was pending); *Teegarden v. MERS, Inc.*, 2014 WL 7213189 at *4 (W.D. Wash., Dec. 17, 2014) (same).

Accordingly, the Court GRANTS PSE's Motion to Dismiss as to Plaintiffs' claim for slander of title.

In sum, Plaintiffs' claims against PSE for conspiracy to defraud, trespass, inverse condemnation, and slander of title are all dismissed with prejudice, without leave to amend.¹⁴

IV. Conclusion

For the foregoing reasons, the moving Governmental Defendants' Motion to Dismiss

¹⁴ "Leave to amend need not be granted, and dismissal may be ordered with prejudice, if amendment would be futile." *Lapinski*, 2014 WL 347274 at *2. "A district court may deny a plaintiff leave to amend if it determines that allegation of other facts *consistent with the challenged pleading* could not possibly cure the deficiency." *Alvarez v. Chevron Corp.*, 656 F.3d 925, 935 (9th Cir. 2011) (emphasis added). In their Response, Plaintiffs failed to provide the Court with any additional facts that could raise their claims above the speculative level, nor could they, consistently, with the judicial admissions they have made in their Complaint. *See American Title Insurance Co.*, 861 F.2d at 226 (explaining that allegations in a complaint are admissions binding on the maker).

1 Tort Claims (Dkt. No. 23) and Defendant Puget Sound Energy's Motion to Dismiss (Dkt. No.
2 29) are both GRANTED.

3 DATED this 30th day of June 2015.

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A handwritten signature in black ink, reading "John C. Coughenour", is written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE